

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

LOCAL NO. 1694-1 INTERNATIONAL

LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

and

DIAMOND STATE PORT CORPORATION,

Respondent.

Rep. Pet. No. 96-05-179

[Request for Declaratory Statement]

The Diamond State Port Corporation ("Diamond State" or "Respondent") is a public employer within the meaning of §1302 (n) of the Public Employment Relations Act ("Act"). 19 Del.C. Ch. 13 (1994). Local 1694-1 of the International Longshoremen's Association, AFL-CIO, ("Union" or "Petitioner") is an employee organization within the meaning of 19 Del.C. §1302 (h).

On May 21, 1996, the Petitioner filed the following petitions with the Public Employment Relations Board ("PERB"): (1) Petition For Unit Determination/Certification/Decertification; and (2) Petition For Amendment Or Clarification Of Existing Certified Bargaining Unit.

On the petition entitled "Petition For Unit Determination/Certification/Decertification", the Petitioner set forth the following description of the appropriate bargaining unit:

Crane Operators (utility crane), Lift Truck Operators (utility lift truck), Laborers, Mechanics, Electrician-Welder, Plant Maintenance Workers, Line Runners, Janitors and Janitresses. Exclude: All office personnel, supervisors and guards, as defined in the Act.

In compliance with §1311 of the Act, the Petitioner also submitted authorization cards signed by at least 30% of the currently unrepresented employees seeking to be represented by the Petitioner as part of the existing bargaining unit.

As set forth on its face, the second document submitted by the Petitioner entitled "Petition For Amendment Or Clarification Of Existing Bargaining Unit", is intended to accomplish one (1) of two (2) purposes: (1) Amendment of Certification (Petitioner seeks Amendment or Modification of the existing certified bargaining unit) or (2), Bargaining Unit Clarification (Petitioner alleges that there exists a question as to whether certain positions are included or excluded from currently certified unit). Although the form instructs the petitioner to mark the one (1) appropriate choice, the Petitioner in this matter, checked both alternatives and described the appropriate bargaining as:

Plant Maintenance Workers, Line Runners and recurrent (incl. seasonal) employees (1000 hours per year minimum).

The text of the letter dated May 28, 1996, from the PERB notifying the State's Office of Labor Relations of the filing is set forth below, in its entirety:

Enclosed please find a petition filed by International Longshoremen's Association, AFL-CIO, which seeks to amend the existing bargaining unit of Diamond State Port Corporation employees represented by ILA Local 1694-1. I have also enclosed a copy of Mr. Eisenstadt's covering letter dated May 21, 1996.

Department of Labor Case No. 103 (formerly case 154) records indicate that the existing bargaining unit is defined to include:

All crane operators, Lift Truck Operators, Laborers, Mechanics, Electrician-Welders, Janitors and Janitresses. The unit excludes: All office personnel, supervisors and guards.

The petition seeks to amend this unit to also include the currently unrepresented positions of:

- Plant Maintenance Workers
- Line Runners
- "Recurrent employees", including seasonal employees who work a minimum of 1,000 hours per year.

In order to verify that this petition is properly supported by at least thirty percent (30%) of the employees in these unrepresented

positions, please provide me with a list of all persons employed by the Diamond State Port Authority in the petitioned for positions, including the name, social security number and classification of each employee. Please be sure to include in the verification list any employee who did not work in the most recent pay period because he/she was either ill, on vacation, or on leave of absence. You may forward the verification list to the PERB at your earliest convenience, but it must be received by the close of business on Monday, June 10, 1996.

Please be advised that PERB Regulation 3.4 provides:

...If the public employer fails to supply the verification within the time specified, the Executive Director shall assume the petitioner has submitted the requisite number of valid signatures.

The employer may submit to the Public Employment Relations Board its position with respect to the requested modification of the unit. Any response you wish to make on behalf of the employer must also be received by Monday, June 10, 1996.

Please do not hesitate to contact our office if you have any questions or concerns.

On June 14, 1996, Diamond State filed the following reply:

Enclosed is a list of all seasonal employees of the Diamond State Port Authority. The list does not include the names of employees who are Plant Maintenance Workers or Line Runners. The position of Plant Maintenance Worker is vacant. The classification of Line Runner does not exist at the Diamond State Port Authority. Line running is a job duty performed by different classifications at the Diamond State Port Authority.

The State objects to the modification of this unit based upon the totality of facts and circumstances attendant to the labor-management history between the parties including, but not limited to, a previous ruling by the Department of Labor on this very issue. DOL Case No. 103(b).

Please call if you require additional information at this time.

The names of all employees receiving wages during the calendar years 1994 and 1995, were provided by Diamond State in two separate lists captioned "W-2 1995" and "W-2 1994." By letter dated June 20, 1996, the PERB advised the parties that because §1311(a), of the Act, provides that authorization cards signed more than twelve (12) months prior to the filing of a representation petition are invalid, the list of 1994 employees was not considered and the petition was validated using only the names appearing on the list of employees receiving wages in calendar year 1995.

More than 30% of the employees appearing on that list signed cards and the petition was, therefore, validated.

By letter dated June 28, 1996, the Petitioner notified the PERB of its desire "to correct the petition by substituting '600 hours,' in place of '1000 hours,' as the demarcation between covered and non-covered workers". As justification for its request the Petitioner claims that under the 1000 hour cap "only a handful of currently covered workers could possibly qualify; whereas the obvious intent behind the amendment/clarification, as evidenced by our client's showing of interest, was to define the unit so as to properly include all employees who have been working alongside the acknowledged unit members with a reasonable degree of regularity that endows them with an overall community of interest."

On July 1, 1993, the firm of Morris, Nichols, Arsht & Tunnell filed a Notice of Appearance replacing the State's Office of Labor Relations as the designated representative of Diamond State. By letter dated July 15, 1996, the PERB advised Diamond State of the Petitioner's desire to amend the original petition.

On July 25, 1996, Diamond State filed a Petition for Declaratory Statement seeking a ruling that ". . . the purported June petition is untimely and therefore not subject for consideration by the Board." In support of its request, Diamond State argues the following:

1. Unlike the unfair labor practice provisions, neither the Act nor the Rules and Regulations provide for the filing of an amended petition to modify an existing bargaining unit. (Letter of July 25, 1996 , pg. 2)
2. 19 Del. C. §1310(f) provides that the appropriateness of a bargaining unit may be challenged "not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the date of the passage of this Chapter, which is the case

here since the current Agreement was in effect on September 23, 1994, the effective date of the passage of the Act." (Letter of July 25, 1996, pg. 2)

3. Rule 1.10 provides that the Board shall strictly construe all time limitations contained in the Act and in these Regulations. While Rule 1.9 provides that the Board's Rules and Regulations are to be liberally construed so as to accomplish the efficient operation and administration of the Act and may be waived or suspended at any time during the proceeding, to do so here would deprive the Respondent of a substantial right, i.e., the right to the certainty of the time requirements set forth in 19 Del.C. § 1311. (Letter of July 25, 1996, pg. 4)

On August 13, 1996, the Union filed its Response to Diamond State's Petition for a Declaratory Statement, claiming essentially that:

1. The petitioned for employees are included within the current bargaining unit definition initially certified as appropriate by the Department of Labor. (Letter of August 9, 1996, pg. 3)
2. The status of "regular full-time" and "regular part-time" employees has never been defined by the PERB and the term "casual" has never been defined by the parties. (Letter of August 9, 1996, pg. 3)
3. Since the appropriateness of the existing bargaining unit is not being questioned the time limitations set forth in §1310(f), of the Act, do not apply. (Letter of August 9, 1996, pg. 4)
4. The Petitioner seeks a "correction," rather than a "modification" of its petition, concerning the number of hours which an employee must work to be deemed a "regular part-time" employee rather than merely a "casual" employee which is ultimately the responsibility of

the PERB in determining the community of interest required by §1310(d), of the Act. (Letter of August 9, 1996, pg. 6)

5. Denying the Petitioner's request to correct the Petition would deprive the employees substantial rights guaranteed by the Act and frustrate the declared intent of the legislature and the policy underlying the Act, itself. (Letter of August 9, 1996, pg. 7)

### ISSUE

Whether the June, 1996, petition filed by Petitioner is untimely and, therefore, not subject to consideration by the Board? (Petition For Declaratory Statement, pg. 4)

### DISCUSSION

The PERB administers three (3) separate but similar statutes: The Public School Employment Relations Act ("PSERA"), 14 Del.C. Ch. 40 (1983), amended (1990); The Police Officers and Firefighters Employment Relations Act ("POFERA"), 19 Del.C. Ch. 16 (1986); and The Public Employment Relations Act ("PERA"), 19 Del. C. Ch 13, (1994).

Representation petitions filed under these Acts raise a variety of issues which must necessarily be considered within the context of the fact situation in which they arise. Accordingly, it is necessary to consider what the Petitioner is attempting to accomplish vis-a-vis the various petitions and established PERB practice with regard, thereto.

The most frequently filed representation petitions concern questions of the appropriateness of an existing or proposed bargaining unit, clarification as to whether an existing, new or revised position is included within an existing bargaining unit definition, modification of an existing bargaining unit definition, certification of an exclusive bargaining representative for currently unrepresented employees and decertification of a certified bargaining representative.

Questions concerning the appropriateness of an existing bargaining unit are addressed in each of the statutes at §§4010(f), 1610(f) and 1310(f), respectively, which provide:

Any bargaining unit designated as appropriate prior to the effective date of this Chapter, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under this Chapter. The appropriateness of the unit may be challenged by the public employer, 30 percent (30%) of the members of the unit, an employee organization, or the Board not more than 180 days prior nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the date of the passage of this Chapter.

Here, the Petitioner does not allege that the current unit designated as appropriate prior to September 27, 1994, is inappropriate. Therefore, the petition does not raise a question of appropriateness under 19 Del.C. §1310(g) and the time constraints, commonly referred to as the "contract bar," set forth therein, do not apply.

A clarification petition serves to clarify whether a specific classification falls within an existing bargaining unit definition. Prior to the PERB assuming jurisdiction over these employees in 1994, the Union requested a clarification of the current bargaining unit in Department of Labor Case No. 103(b). In a decision issued on January 13, 1989, the Secretary of Labor, in DOL Case No. 103(b), concluded:

The Union did not seek the casuals into the unit nor did Council, at that time, recommend that it was appropriate to have these positions in the unit. The intent of the parties was for their exclusion from this bargaining unit as stated and evidenced by the petition, election, and negotiated language in the collective bargaining agreement.

Because the employees which the Petitioner now seeks to represent were not previously petitioned for and are not, therefore, included within the current bargaining unit definition the instant petition does not raise a clarification issue.

A modification petition is filed for the purpose of modifying an existing bargaining unit definition in accord with Board Regulation 3.4 (8), Modification of a Bargaining Unit, which provides:



In the event there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining unit definition, or there is some compelling reason for the Board to consider modifying the designated bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board which shall include the following (Attachment D):

- (a) The name of the employer;
- (b) The name of the exclusive representative;
- (c) A description of the bargaining unit;
- (d) A brief statement explaining the reasons for a modification of the bargaining unit.

One of the applicable procedures set forth in Regulation 3.1(b), to which the filing of a petition to modify a bargaining unit must conform is a window period occurring between the 120th and 180th day immediately preceding the expiration date of an existing collective bargaining agreement with a duration of three (3) years or less.

The Petitioner's primary purpose, however, is not to modify the existing bargaining unit within the meaning of Rule 3.4(8) and the time constraint set forth therein does not apply.

A decertification petition is filed solely for the purpose of terminating the exclusive bargaining status of a current bargaining representative and has no bearing on the resolution of this matter.

Clearly, the Petitioner's intent is to be certified as the exclusive bargaining representative for a group of currently unrepresented employees and, if successful, to include them in the existing bargaining unit. To accomplish this objective, the Petitioner properly filed a representation petition supported by a showing of interest of at least 30% of the unrepresented employees whom it seeks to represent.

There is no statutory exclusion in any of the Acts administered by the PERB excluding less than full time employees from the right to be represented by and bargain collectively through representatives of their choosing over terms and



conditions of employment. Concerning the eligibility of less than full time employees the PERB has held that:

The PERB has consistently broadly construed employees' representation rights as a fundamental premise of the Act, the statute neither defines nor excludes from its coverage durational, seasonal, casual or any other category of less than full time employees. Consequently, these employees are eligible for representation under the Act. Delaware Public Employees Council 81, AFSCME, AFL-CIO, v. State of Delaware Turnpike Administration, Del. PERB, Rep. Pet. No. 95-06-140 ((1995), PERB Binder II @ pg. 1192). (See also In Re: U.D. Bus Drivers v. AFSCME Local 439, Del. PERB, Rep. Pet. 95-04-126 ((1995), PERB Binder II @ 1207).

19 DeL.C. §1310, confers upon the PERB's exclusive authority to determine whether or not a proposed unit satisfies the statutory criteria required to constitute an appropriate unit. Upon considering the representation rights of unrepresented employees vis-a-vis an existing unit, the PERB concluded:

In administering the provisions of the POFERA [Police Officers and Firefighters Employment Relations Act], the Public School Employment Relations Act and the Public Employment Relations Act, the PERB has established by practice and policy that the right to be represented for purposes of collective bargaining begins with and accrues to any group of statutorily eligible public employees seeking representation. Once a labor organization is certified through a secret ballot election as the exclusive bargaining representative of the designated bargaining unit, that organization has the right and obligation to represent that unit and the employer has the right and obligation to deal exclusively with that representative. Once part of a represented bargaining unit, however, the desires of any group of individual employees within that unit relative to representation matters are expressed solely through the decertification and certification procedures.

Consistent with this policy and practice, the PERB has entertained representation petitions filed by unrepresented employees seeking to be represented through inclusion within an existing bargaining unit. The PERB has required a showing of interest by at least thirty percent (30%) of the unrepresented employees and an indication by the exclusive representative of the bargaining unit that it is willing to represent the employees/positions in question. Notices of the petition are posted at the PERB's direction in the workplace to notify all affected employees of the proposed change to the unit. If it is determined that the position(s) in question are appropriate for inclusion in the existing unit, a secret ballot election is held among the unrepresented employees to determine whether a majority of these employees desires to be represented, consistent with their statutory right to choose their representative, if any. If the vote fails, the positions in question do not become part of the bargaining unit and the employees in those positions remain unrepresented consistent with the desires of the

majority. In Re: Battalion Chiefs of the City of Wilmington Fire Department, Del. PERB, Rep. Pet. 95-06-142 ((1995), PERB Binder II @ pg. 1257) [1]

The National Labor Relations Board in Capitol Insulation Co., Inc. and Colorado State Council of Carpenters (233 NLRB 129, 96 LRRM 1592 (1977)), considered the number of hours a casual employee must work in order to be included in the bargaining unit a valid factor for it to consider in defining an appropriate unit.

The decision of the National Labor Relations Board in Capitol Insulation (Supra.), while not binding on the PERB, supports a similar conclusion by the Delaware PERB.

Petitions filed by an employee organization seeking to be certified as the exclusive bargaining representative for a group of unrepresented employees as part of an existing bargaining unit have historically been processed as a certification petition. Thus, in the absence of a statutory restriction such petitions may be filed at any time and must, pursuant to 19 Del.C. §1311(a), be supported by the signatures of at least 30% of the unrepresented employees whom the petitioning representative seeks to represent.

To conclude that a certification petition which can be withdrawn and resubmitted at any time cannot be amended would serve no purpose other than to unnecessarily delay the representation process and frustrate the will of the petitioning employees, regardless of the result. This fact, together with the PERB's authority to ultimately establish the number of hours an employee must work in a specific time period in order to be eligible for inclusion in a particular bargaining unit and the procedure for processing certification petitions protects the due process

[1] See also: In RE: Kent Vo-Tech School District Special Education Instructional Aides, Del.PERB, Rep. Pet. 91-06-065 ((1992) PERB Binder I @ p. 737); In RE: Caesar Rodney School District Instructional Aides, Del.PERB, Rep. Pet. 92-03-070 ((1992) PERB Binder II @ p. 821); In RE: Milford School District Limited Contract Employees, Del.PERB, Rep. Pet. 94-11-109 ((1996) PERB Binder II @ p. 1301); In RE: DHSS Stockley Center Habilitation Supervisors, Del.PERB, Rep. Pet. 95-06-145 ((1996) PERB Binder II @ p. 1399)

rights of not only the employer and the bargaining unit but most importantly those of the employees.

In order to clarify the status of this type of petition and to avoid misunderstanding concerning the application of the time limits set forth in §1310(f), of the Act, and/or PERB Regulation 3.1 (b), future attempts to organize currently unrepresented employees and to include those employees in an existing bargaining unit will be processed only when submitted as a certification petition on the form entitled Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative.

#### **DECISION**

Because a certification petition can be initiated at any time it logically can also be amended. For this reason, the petition filed by the Union in June, 1996, is timely and a proper subject for consideration by the PERB.

Regardless of whether specifically addressed in the petition, the number of hours required of less than full time employees is properly a factor to be considered by the PERB in defining the appropriate bargaining unit. Therefore, the application of the contract bar to the Petitioner's attempt to modify the original petition is, for all practical purposes, irrelevant to the appropriateness of the unit sought.

**IT IS SO ORDERED.**

/s/Charles D. Long, Jr.  
CHARLES D. LONG, JR.  
Executive Director  
Delaware Public Employment Relations Bd.

DATED: 23 September 1996